

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

CHARLES HICKS, #246241,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:07-CV-148-MEF
	)	
DEPT. OF CORRECTIONS, et al.,	)	
	)	
Defendants.	)	

**ORDER ON MOTION**

On February 28, 2007, the medical defendant filed a motion for leave to file in which it seeks leave of court to file (i) a motion to set aside order, (ii) a motion to dismiss and (iii) a motion for sanctions. Contrary to the medical defendant's assertion, the claims alleged against this defendant, i.e., on February 15, 2007, plaintiff had to wait over 6 hours to see the doctor and the health care staff failed to provide him adequate food for his diabetic condition during this wait, do not warrant dismissal as frivolous. Moreover, the plaintiff is entitled to present complaints to this court challenging actions which he believes are violative of his constitutional rights. The mere fact that the plaintiff has filed previous suits challenging the medical treatment provided to him does not render subsequent suits frivolous. Additionally, failure of exhaustion is an affirmative defense which must be raised by the defendants. *Jones v. Bock*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910, 921 (2006). Thus, the defendants may present this defense in their special report and answer, supported by appropriate documentation which outlines the grievance procedure available to the plaintiff

and supports their argument that the plaintiff has failed to exhaust such remedy in accordance with the outlined procedures. With respect to the defendant's argument that the plaintiff suffered no physical injury related to his claims, this argument is not apparent from the complaint as the plaintiff alleges a denial of food necessary to treat his diabetic condition. The court further notes that such argument is more appropriate for the special report where the medical defendant can support this argument with relevant evidentiary materials.

In light of the foregoing, it is

ORDERED that the motion for leave to file motions be and is hereby DENIED.

Done this 1st day of March, 2007.

/s/ Charles S. Coody  
CHARLES S. COODY  
CHIEF UNITED STATES MAGISTRATE JUDGE